In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 267

UNITED STATES OF AMERICA, *Petitioner*,

v.

NEIFERT-WHITE COMPANY, *Respondent*.

Brief of Respondent

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QUESTION PRESENTED

Does filing an invoice in support of an application for a loan from a Government agency constitute participation in making a claim against the Government within the meaning of the False Claims Act?

STATUTE INVOLVED

31 U.S.C. provides in pertinent part:

"Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval, . . . any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, . . . shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may

have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

SUMMARY OF THE ARGUMENT

The court below properly applied the definition of the term "claim" that this Court provided in *United States v. Cohn*, 270 U.S. 339. This definition was central to the decision in *Cohn* and its continuing relevancy was recognized by this Court in *United States v. McNinch*, 356 U.S. 595. Normal usage and understanding would not consider an application for a loan to be a "claim". Indeed, a loan application is nothing more than a request to enter into a contractual relationship.

It is true that there have been a few cases where liability has been imposed under the False Claims Act where it would appear that a "claim" as defined in *United States v. Cohn*, 270 U.S. 339, was not present. These cases fall into two categories. The first cgateory is characterized by cases such as *Rainwater v. United States*, 356 U.S. 590, which did not even consider whether a "claim" was involved and therefore did not decide it. The second category is characterized by *United States v. Cherokee Implement Co.*, 216 F. Supp. 374 (N.D. Iowa), which demonstrated fundamental errors in interpreting the applicable law.

In *United States ex rel. Marcus v. Hess*, 317 U.S. 537, and *United States v. McNinch*, 356 U.S. 595, this Court recognized that the False Claims Act can only be applied where a claim, based on the Government's own liability to the claimant, is involved. In *Hess*, the fraudulent collusive bidding practices of contractors caused the Government to pay claims that were made by the local sponsors of P.W.A. projects. Liability was imposed under the Act. In *McNinch*, fraudulent misrepresentations had been made on loan applications in order to secure F.H.A. approval and insurance. However, since the loans were not defaulted, liability was not imposed because the fraudulent applications did not result in a claim being made against the Government, based on the Government's liability to claimant.

The overriding purpose of the civil section of the False Claims Act is readily ascertainable from its language. It was meant to provide protection to the public treasury against false "claims", as that term was defined in *United States v. Cohn*, 270 U.S. 339. The fact that the criminal sections of the Act (18 U.S.C. § 287 and § 1001) contain language that clearly encompasses the making of both false claims and false statements and that language referring to false statements is totally absent in the civil section is a clear directive that the term "claim" is not to be given the broad meaning urged by the Government. It is

not the function of the courts to rewrite ancient statutes so that they will fit smoothly into the scheme of modern legislation. That is a task properly left to the legislative branch.

ARGUMENT

1. A "CLAIM" WITHIN THE MEANING OF THE FALSE CLAIMS ACT IS A CLAIM FOR MONEY OR PROPERTY TO WHICH A RIGHT IS ASSERTED AGAINST THE GOVERNMENT, BASED UPON THE GOVERNMENT'S OWN LIABILITY TO THE CLAIMANT.

The transactions we are dealing with here involve applications for loans. The defendant submitted an allegedly false invoice in support of the loan applications. These loans, the terms of which are fully set out in note 12 herein, were fully repaid and the Government has not asserted or alleged that it suffered any damages as a result of any of these transactions. Under these circumstances, can it be said that the defendant made, or caused to be made a claim against the Government?

In *United States v. Cohn*, 270 U.S. 339, at 345-346, this Court said:

> While the word "claim" may sometimes be used in the broad juridical sense of a "demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty" (Prigg v. Pennsylvania, 16 Pet. 539, 615, 10 L.ed. 1060 1089),

> it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a "claim upon or against" the government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the government, based upon the government's own liability to the claimant.

The Government has consistently argued that *Cohn* stands only for the narrow proposition that there is no claim against the Government where the property involved does not belong to the Government. The court below disagreed with this argument and took the position that *Cohn* held that there was no "claim" under the Act for two reasons: (1) no right was asserted against the Government based upon the Government's own liability to the claimant, and (2) the property which was sought and obtained did not belong to the United States.[1] Clearly, both reasons are equally dispositive of the case. Thus, the *Cohn* definition of the term "claim" is certainly valid and binding, and is not to be disregarded as having no bearing on the holding of the case. Indeed, this Court recognized its continuing significance in *United States v. McNinch*, 356 U.S. 595.

In addition, careful consideration of the *Cohn* case, and of the language found in the statute leads to

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[1]A. 36.

the inevitable conclusion that this definition given to the term "claim" is not only required by the statute, but also reflects the common usage and understanding of the term.

The instant case involves applications for loans.

> A loan of money is something more than the mere delivery of money by the owner to another. In order to constitute a loan there must be a contract whereby, in substance, one party transfers to the other a sum of money which the other agrees to repay absolutely, together with such additional sums as may be agreed on for its use.[2]

If a loan is a contract, then an application for a loan is a request to enter into a contractual relationship. In this sense, the applications involved here are very much like the applications for FHA insured loans that have given rise to a number of cases under the False Claims Act. The Farm-Storage Facility Loan Program was designed to grant the growers of certain commodities the privilege of borrowing money to finance the purchase of storage facilities. In *United States v. Tieger*, 234 F.2d 589 at 591 (C.A. 3), a False Claims Act case involving fraudulent applications for FHA insured loans, the court said that, ". . . this privilege of contracting certainly is not a claim in normal business or legal usage and terminology."

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[2]54 C.J.S. "Loans," p. 654. Also cited in District Court opinion at A. 28.

In footnote No. 7 of the *Tieger* opinion, the court made the following observation:

> The "claim" must be presented for "payment or approval." This describes the usual procedure in making a demand for money or property but is not an apt characterization of what is done in calling upon another to enter into a contract.

The Government argues that the various federal courts have applied the test that they urge (i.e. has there been a disbursement of money or property?) and that if the 9th Circuit's interpretation of *Cohn* is allowed to stand it will not be consistent with the subsequently decided False Claims Act cases. This is not the case. Most of the cases relied upon by the Government in their argument below did indeed involve claims against the Government in that the claim was based on the Government's own liability to the claimant. The only cases which found liability in which it would appear that a claim based upon the Government's liability to the claimant was not involved fall into two categories. The first category is composed of *Rainwater v. United States*, 356 U.S. 590; *United States v. Cato Bros., Inc.* and *United States v. Toepleman*, which were decided in the same opinion with *United States v. McNinch*, 356 U.S. 595, and the case cited at page 12 of the Government's brief *United States v. Templeton*, 199 F.Supp. 179 (E.D. Tenn.). In these cases a claim, based upon

the Government's own liability to the claimant, does not seem to be present. However, not one of the cases addressed itself to the question as to whether an application for a loan constituted the making of a claim against the Government. Indeed, there is nothing to indicate that the issue was ever raised at any point of the proceedings in any of these cases. At page 12 of Appellant's brief, the following statement is found:

> Similarly, in a number of lower court cases raising questions as to the application of the False Claims Act, the parties and the courts have consistently assumed that the term "claim" included an application for a loan.

Such assumptions do not constitute legal precedent and indeed, there is nothing to indicate that this Court indulged in such a presumption when it decided *United States v. McNinch*, 356 U.S. 595. In short, these cases are not valid authority for the proposition for which the Government cites them.

The second category of cases is represented by *Sell v. United States*, 336 F.2d 467 (C.A. 10) and *United States v. Cherokee Implement Co.*, 216 F.Supp. 374 (N.D. Iowa). The *Cherokee* case involved a fraudulent application for a Commodity Credit Corporation equipment loan. In response to the defendant's motion to dismiss the Court said that, "Where the United States actually makes a loan by reason of a false ap-

plication, there may be a claim under the false claims statute." *Id.*, 216 F.Supp. at 375. For this proproposition, the court cites *Rainwater v. United States*, 356 U.S. 590. As we have pointed out, *Rainwater* simply did not decide this question and, therefore, does not provide authority for the proposition for which the *Cherokee* opinion cites it. But this is not the principal error in the decision.

In the course of its opinion, the court said:

> In United States v. Veneziale, 268 F.2d 504 (3rd Cir. 1959), it was considered a false claim when the Government had to pay on a loan guaranteed. In all these cases where money was actually paid out in response to a false application for a loan, it was a claim within 31 U.S.C.A. §231, Smith v. United States, 287 F.2d 299 (5th Cir. 1961); United States v. Brown, 274 F.2d 107 (4th Cir. 1960); United States v. Globe Remodeling Co., Inc., L.C. 196 F.Supp. 652. (*United States v. Cherokee Implement Co.*, 216 F.Supp. 374 at 375.)

The *Veneziale* case involved an FHA insured loan that was defaulted. The loan application had been fraudulent and when the loan was defaulted the Government was called upon to make good on its guaranty. The *Globe Remodeling Co.* case likewise involved Governmental liability as a guarantor on a defaulted loan. The *Smith* case involved a contract whereby the Government agreed to lease one of its housing projects.

to the Beaumont Housing Authority. Under the terms of the contract, the amount of rental was to be equal to the amount by which operating revenues exceeded approved expenses. The Government also agreed to advance funds to cover operating deficits. Mr. Smith, an employee of Beaumont, submitted false quarterly reports which indicated that the operating revenues were less than the approved expenses, thus requiring the Government to advance funds to cover the deficit. The *Brown* case involved false claims for support prices on a tabacco crop. Clearly, none of these cases involved money that was paid out as the result of a loan application. In *Veneziale* and *Globe Remodeling Co.* money was paid out because there had been a default on a separate loan contract. Loans were not even involved in the other cases.

In *Sell v. United States*, 336 F.2d 467 (C.A. 10) the defendant had been indicted and charged with a violation of 15 U.S.C. § 714m(a).[3] Subsequently, the Gov-

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[3] 15 U.S.C. §714m (a) provides as follows:

"(a) Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under sections 714-714o of this title, or under any other Act applicable to the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both."

We wish to note that this is the same provision Neifert-White was indicted under in the criminal action brought against it. Criminal No. 3490, U.S. District Court for the District of Montana, Helena, Division.

ernment filed a complaint in a civil action seeking to collect double damages and a $2,000.00 penalty under the provisions of 31 U.S.C. § 231. The criminal case was tried and the defendant was convicted. The Government then moved for a summary judgment in the civil action upon the theory that the factual issues in both cases were identical and that they had already been determined. The Government was successful.

On appeal, the 10th Circuit affirmed the decision granting the summary judgment and in so doing made the following statement:

> The elements necessary to establish liability under the False Claims Act are set forth in the statute and the existence of all of those elements was at issue and established in the criminal action, with the exception of the requirement of the False Claims Act that the claimant be a person "not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States." *Id.*, 336 F.2d at 475.

As the Court below pointed out,

> The criminal statute, unlike the False Claims Act, does not require that a "claim" be made against the United States, but requires only the making of a false "statement" for the purpose of influencing the action of the C.C.C., or for the purpose of obtaining money, property, or anything of value.[4]

[4] A. 41.

This fundamental error destroys the value of the *Sell* case as an applicable precedent in the instant case.

The Government argues that *United States ex rel. Marcus v. Hess*, 317 U.S. 537 ". . . is a clear ruling that the term 'claim' is not limited to situations involving a right that could be legally enforced against the government."[1] We do not agree. At 317 U.S. 542-543 this Court said:

> We think the conduct of these respondents comes well within the prohibition of the statute which includes "every person who . . . causes to be presented, for payment . . . any claim upon or against the Government of the United States . . . knowing such a claim to be . . . fraudulent."
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> * * *
>
> The government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. *By their conduct, the respondents thus caused the government to pay claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as the result of the fraudulent bidding.* (Emphasis supplied.)

Thus, it would appear that the ruling of this Court in *Hess* was that liability extended to anyone who *caused* a false claim to be made against the Government. The opinion of the Court below does not say that the False Claims Act applies only where the person guilty of

[1]Brief For The United States, p. 9.

fraud makes a claim against the Government based on the Government's liability to him. The Act itself and the cases make it perfectly clear that it is not necessary that the person guilty of the fraud make the claim against the Government himself, or that the Government's liability be to him. (Of course the Act would apply under such conditions.) What is required by the Act, the cases and the opinion of the Court below, is that the guilty party cause such a claim to be made against the Government, based on the Government's own liability, whether that liability be to the guilty party or some entirely innocent third party.

An excellent example of the application of this rule can be found in *United States v. Lagerbusch*, 361 F.2d 449 (C.A. 3) a case first cited by the Government in the Court below. Mr. Lagerbusch was apparently the recipient of unearned and undeserved payments as the result of false representations (of some undisclosed nature) which he made to his employer. The employer, Hercules Powder Co., was operating under a cost plus contract "under which the United States paid or reimbursed Hercules for all operating costs, including the sums fraudulently obtained from Hercules by the appellant."* Here, the employee did not personally make a direct claim against the Gov-

*361 F.2d 449.

ernment and the Government was under no liability to him. However, the employee's fraudulent representations caused his employer to make a claim against the Government based on the Government's liability to the employer. The claim made by the employer contained an element of fraud (i.e. the undeserved payments caused by the employee's fraud) and that in turn caused a fraudulent claim to be made against the Government, based on the Government's own liability to the claimant (i.e. the employer). This is analogous to what happened in *Hess*. The contractors made a claim against the local municipalities which in turn made a claim on the Government for the funds it had agreed to supply. Because of the collusive bidding on the part of the contractors, the Government was required to supply a greater amount of money to the local sponsors than it should have. *Hess* was not decided on the basis of claims made by the contractors against the Government, but rather on the basis of claims against the Government which the contractors caused to be made.

The Government argues that *United States v. McNinch*, 356 U.S. 595 can be cited for the proposition that the term "claim" ". . . could be literally construed to embrace any assertion of a 'right or privilege to draw upon the Government's credit,' "[1] and that the principal test applied by the Court to determine whether a "claim" was involved was to de-

[1]Brief For the United States. p. 10.

termine whether or not funds had been disbursed. At page 598-99, the Court said:

> We acknowledge the force in the Government's argument that literally such an application could be regarded as a claim, in the sense that the applicant asserts a right or privilege to draw upon the Government's credit. But it must be kept in mind, as we explained in Rainwater, that in determining the meaning of the words "claim against the Government" we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions. (citing cases).
>
> In normal usage or understanding an application for credit insurance would hardly be thought of as a "claim against the Government." As the Court of Appeals for the Third Circuit said in this same context, "the conception of a claim against the government normally connotes a demand for money or for some transfer of public property." United States v. Tieger (CA3 NJ) 234 F2d 589, 591. In agreeing to insure a home improvement loan the FHA disburses no funds nor does it otherwise suffer immediate financial detriment. It simply contracts, for a premium, to reimburse the lending institution in the event of future default, if any.

Clearly, the Court recognized, but rejected, the Government's argument that ". . . the term 'claim' was

not limited to a claim of right to government money . . .'" within the meaning of the False Claims Act. The statement by the Court that the definition of "claim" as found in *United States v. Cohn*, 270 U.S. 339, was relevant further discredits the Government's position in this case.

The argument that *McNinch* determined that a claim was not involved on the ground that no funds were disbursed is likewise refuted by the language of the opinion when read as a whole. Quite clearly, the decision rests on the proposition that an application for credit insurance does not constitute the making of a "claim" against the Government because it does not amount to a demand for the transfer of money or property based on the Government's liability to the claimant.

2. THE LANGUAGE AND HISTORY OF THE FALSE CLAIMS ACT DEMONSTRATE THAT THE COURT BELOW PROPERLY INTERPRETED THE MEANING OF ITS PROVISIONS.

The Petitioner asserts that the term "claim" must be interpreted to include any situation where the Government disburses money or property in order to give effect to the broad purposes Congress had in passing the legislation. As this Court stated in *McNinch*, we are dealing with a criminal statute and this Court

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[9]Ibid.

has decided that broad questions of policy are not to be considered determinative when the issue involves the interpretation of a statute which falls in this category. We here refer the Court to its decision in *McBoyle v. United States*, 283 U.S. 25, which we discussed on pages 10 and 11 of our Brief in Opposition to the Government's Petition For Writ of Certiorari.[9]

However, the rule against broadly interpreting the provisions of criminal statutes is not the only argument against interpreting this Act in the manner the Government has requested. As this Court said in *McNinch*, "At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government."[10]

[9]It is a well established principle that where a statute imposes criminal sanctions, as the False Claims Act indeed does, the language of the statute should be required to give fair warning to the public as to what sort of conduct is condemned, and further, that if any ambiguity exists in such a statute, the ambiguity should be construed against the government. In deciding that an airplane did not come within the meaning of the term "motor vehicle" under the provisions of the National Motor Vehicle Theft Act, the eminent Mr. Justice Holmes said:

> ". . . (I)t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used."
> **McBoyle v. United States,** 283 U.S. 25 at 27.

[10]356 U. S. 599.

But if the Act applies any time there has been a disbursement of Government funds, as the Petitioner would have us believe, it is difficult to conceive of any kind of fraud that would not be reached by the False Claims Act. Quite obviously, the *McNinch* opinion recognized that the False Claims Act was designed to reach only those frauds which involve a claim against the Government based on the Government's liability to the claimant. As the 9th Circuit said in *United States v. Howell*, 318 F.2d 162 at 165 (C.A. 9), "If the Act were intended to cover any and all attempts to cheat the United States, we doubt that the Congress would have used the word 'claim' to specify such an intent."

The Petitioner has taken the position that since the purpose of the Act was to stop the "plundering of the public treasury,"[11] the Act should be applied to any conduct or transaction which might have this tendency. In addition to the foregoing arguments, there are two additional reasons why this broad policy argument is not controlling, or perhaps even relevant here.

In the first place the terms of the loan contracts involved here precluded the possibility of the public

[11]Brief For the United States, p. 7.

treasury being plundered.[12] At the time the Government disbursed the loan, it received in return security interests in property which it had determined to be of sufficient value to provide adequate security for the loan. At no point was the public treasury depleted, because it possessed assets which had a value equal to the amount of the loan. The only possible way the treasury could have lost money would have involved a loan default and a discovery that the security was inadequate. Here, none of the loans were defaulted and the Regulations governing the administration of the program placed the responsibility for determining the adequacy of the security directly upon the body administering the program. Thus, not only was the treasury not depleted, it could not have been. In

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[12]The terms of the loan contracts involved in this case can be found at 23 Federal Register 5029 (July 2, 1958). It is to be noted that §474.752 requires that the county committee, or some other person authorized by the CCC, make a determination as to whether a mortgage on the facility alone is sufficient security for the loan. If it is not, the county committee can demand an additional mortgage on a saleable unit of real estate as further security. As additional insurance, §474.727 of the Regulations requires that the constructed facility be inspected by a designated employee of the county committee or the committee itself before the actual disbursement of the loan takes place.

The loans are made for a period of 4 years and the interest rate is 4% per annum on the unpaid balance. The Regulations provide that the contract is to include an acceleration clause and a severance agreement. All liens required as security must be first liens. It is clear that only the gross neglect or incompetence of the county committee could cause the Government to lose any money under agreements such as these, regardless of the percentage of the purchase price of the facility that the Government actually financed.

this sense, the situation is analogous to the situation in *McNinch*, because there, although the Government extended its credit, it suffered no loss to the treasury because the loans were not defaulted. Here, although the Government disbursed loans, it received assets of equal value in return, and since the loans were not defaulted there was never a moment during the entire transaction when the treasury was depleted. This sort of transaction hardly represents the "plundering of the public treasury" that the False Claims Act was designed to reach.

Secondly, the False Claims Act does not contain the same provisions today that it did when originally passed. We are respectfully aware of the statement to the contrary made by this Court in *Rainwater v. United States*, 356 U.S. 590, 592-593.

Originally, R. S. § 3490 provided that any person who was not in the armed forces and who committed any of the acts prohibited by the provisions of R. S. § 5438 would be required to forfeit $2,000.00 plus double the amount of damages which the United States may have sustained by reason of such conduct. Subsequently, R. S. § 3490 was codified at 31 U.S.C. § 231. The provisions of R. S. § 5438 are set out, in part, on pages 2 and 3 of the Petitioner's brief. The statute set forth in the Respondent's brief is that of the 1878 codification of the Revised Statutes. It does

not include all of the provisions that were included in the original Act as passed in 1863 and it must be remembered that Senator Howard's comments were directed toward the 1863 version.[18]

The original version of the False Claims Act was enacted in the third Session of the Thirty-Seventh Congress on March 2, 1863. It is found at 12 Stat. 696-698. The first section of the Act, which described the prohibited conduct, applied only to men in the military. The third section, which eventually became R. S. § 3490, provided that any person not in the military who committeed any of the prohibited acts listed in section one was to forfeit $2,000.00 plus double damages and, in addition be punished by from one to five years imprisonment or by a fine of not less than $1,000.00 and not more than $5,000.00. The statute contained the following pertinent language:

> . . .[A]ny person in said forces or service who, for the purpose of obtaining or enabling any other person to obtain from the Government of the United States, or any department or officer thereof, any payment or allowance, or the signature of any person in the military, naval, or civil service of the United States, of or to any false, fraudulent, or fictitious claim, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any signature upon any bill, re-

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[18]Referred to in n. 5 on p. 7 of Petitioner's Brief and also set out in **United States v. McNinch**, 356 U. S. 595 at 599.

> ceipt, voucher, account, claim, roll, statement, affidavit, or deposition; and any person in said forces or service who shall utter or use the same as true or genuine, knowing the same to have been forged or counterfeited; . . .

The language referring to uttering forged or counterfeited papers did not appear in the statute on December 1, 1873.[14] However, this language which was deleted could be interpreted to impose liability upon the mere use of a forged or counterfeited document without the necessity that it be used in conjunction with the presentation of a claim.[15] Thus, the scope of prohibited conduct in the original Act appears to have been larger than it was in the subsequent versions of the Act.

The 1873 version of the act remained substantially unchanged until 1918. By this time R. S. § 5438 had come to be referred to as Section 35 of the Criminal Code. As a result of the 1918 Amendment, this statute then contained the following language:

> . . . [O]r whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the

[14] 18 Stat. 1060.

[15] Unfortunately, the meager library facilities available to us within the State of Montana are not sufficient to allow us to provide the Court with an explanation as to how and why this language was deleted.

> Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry;"[14]

Clearly, this language would extend the penalties of the statute to anyone who made, used or caused to be made or used any fraudulent or fictitious statement or entry without the requirement that such statement or enry be used in conjunction with, or in support of the making of a claim. The Committee on the Judiciary submitted a report on the amendments to Section 35 which stated that,

> The amendments serve to fully reenact and reinforce the provisions of section 35 of the Criminal Code so that it will include all the offenses heretofore contained therein and an offense against "any corporation in which the United States of America is a Stockholder" either as to the preparation of a false claim, a falsification of statements or representations, the use of any false bill, receipt, voucher, etc., against the United States or any department thereof, or

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[14]40 Stat. 1015-1016.

> any corporation in which the United States is a stockholder, and includes the protection of the uniform and all arms, ammunition, and stores of the Army and Navy of the United States in all its branches and divisions as contained in S. 3470, with amendments as hereinbefore set out . . ."[17]

There is a very serious question as to whether Congress really intended to extend the scope of the Act beyond the making of "false claims against the Government." After the statute as amended was read before the House the following exchange took place:

> The SPEAKER pro tempore. Is there objection to the present consideration of the bill?
>
> Mr. GREEN of Iowa. Mr. Speaker, reserving the right to object, unless there is some one who can give some explanation of this bill, I shall object to it, because it seems to me to be very awkwardly worded.
>
> Mr. IGOE. Mr. Speaker, the chairman of the committee is not present, but the only amendments to the existing law are the extension of the penalty of this act to false and fraudulent claims that are presented against corporations in which the United States is a stockholder, and also the punishment of the disposal of the property belonging to the Army or Navy and pledging it or selling it or disposing of it wrongfully."[18]

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[17] H. R. Rep. No. 668, 65th Cong., 2d Sess. 2 (1917-1918).

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[18] 56 Cong. Rec. 11118 (1918).

The language of the Act and the Report from the Judiciary Committee obviously indicate that Mr. Igoe was understating the effect of the amendment and that the penalty of the statute was extended to making false statements and was no longer limited to false claims.

The language added by the 1918 amendment has persisted to the present. In 1948, the provisions of the criminal section of the False Claims Act were divided into two separate sections.[19] These provisions are now found at 18 U.S.C. § 287[20] and 18 U.S.C. § 1001.[21] § 287 deals with false claims and § 1001 deals with false statements. It is also to be noted that the

[19] 62 Stat. 749 and 698.

[20] 18 U.S.C. § 287:

"Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fradulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[21] 18 U.S.C. §1001:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fradulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

provisions of 15 U.S.C. § 714m (a)[7] which was involved in the *Sell* case and which Neifert-White was charged with violating in the criminal action brought against it[8] are very similar to those found in § 1001.

The civil provisions of the False Claims Act were codified at 31 U.S.C. § 231.[9] Unlike R. S. § 3490 the present statute does not refer to the criminal provisions of the Act but rather, specifically describes the sort of conduct that will result in civil liability. The present Act contains no reference to false statements and deals exclusively with false claims. Quite clearly, the criminal sections of the False Claims Act cover every situation which the Government now urges that the civil section covers. If this were the case, then why does the criminal section refer to both false claims and false statements while the civil section deals only with false claims? Likewise, if the Government is so convinced that a claim is involved here why did it not charge Respondent with a violation of 18 U.S.C. § 287 in the criminal action instead of 15 U.S.C. § 714m (a)? If we are to accept the Government's argument, we must also accept its necessary implication, and that is that the term "claim" means one thing in the criminal section and something entirely different in the civil section.

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[7] See n. 3 on p. 10 herein.

[8] Criminal No. 3940, U. S. District Court for the District of Montana, Helena Division.

Petitioner brings this complaint under the provisions of 31 U.S.C. § 231, 232.[a] The complaint alleges that the Respondent submitted false invoices in support of an application for a loan. This may constitute the making of a false statement, but it does not constitute participation in the making of a false claim. 31 U.S.C. § 231 does not impose liability upon persons making false statements. There was no claim involved here and unless there is a claim as defined by this Court in *Cohn*, there can be no liability under the False Claims Act.

Finally, the Government asserts that if the interpretation of the court below is allowed to stand, the application of the statute will lead to absurd results. It should be pointed out that these "absurd results" would be the product of inconsistent legislation rather than the uniform application of the statute. Thus, if Congress desires one of its programs to come under the False Claims Act, it should either draft its legislation to accommodate the provisions of the Act or amend the Act to accommodate the provisions of the proposed legislation. In either event, it is a matter for Congress to remedy, not the courts. The Respondent is not urging a novel application of the Act nor is it propounding a unique definition of the term "claim." Indeed, such conduct is descriptive only of the Government's position.

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[a] A. 2.

The Government argues throughout its brief that the decision below will open the doors to widesrpead abuse of present Government programs. This argument totally ignores the broadly defined criminal statutes* which cover false statements in addition to false claims and provide for penalties of five years and or $10,000.00 fine for each count. Interestingly enough, the Government did not ignore the criminal acts when it proceeded against Respondent criminally prior to the filing of this present action.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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*18 U.S.C. §287; 18 U.S.C. §1001 and 15 U.S.C. §714m (a).